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9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF ARIZONA**

11 Grand Canyon West Ranch LLC,

12 Plaintiff,

13 v.

14 Sally Jewell, Secretary, United States
15 Department of Interior, *et al.*,

16 Defendant.
17

CIV-03-02496-PCT-NVW

**[PROPOSED] FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

18
19 Pursuant to this Court's September 6, 2013 Order, the United States submits the
20 following Proposed Findings of Fact and Conclusions of Law. A copy of the following in
21 MS Word format will be submitted to chambers concurrent with this filing.

22 **PROPOSED ORDER**

23 Before the Court is Plaintiff's Second Application for Preliminary Injunction, (Doc.
24 177), later Clarification (Doc. 186), the United States' Response (Doc. 198), Plaintiff's
25 Reply (Doc. 213), and amicus briefs filed by the Hualapai Nation (Doc. 207) and Fann
26 Contracting (Doc. 210). The Court has considered all arguments and exhibits therein. As
27 set forth below, Plaintiff's Motion will be DENIED; and, pursuant to the United States'
28

1 stipulation, the Court will order conveyance of a Temporary Easement to the Bureau of
2 Indian Affairs under the provisions below.

3 As set forth in the Court's July 3, 2013 Order, this action arises from an alleged
4 breach by Defendants of a settlement agreement that they reached with Plaintiff in 2007
5 regarding the construction of a roadway across Plaintiff's property. Plaintiff's present
6 motion seeks a Court order "to stop all public vehicular traffic through the Right-of-Way
7 granted to the United States ("U.S.") until the U.S. completes construction of the road
8 stated in the parties' settlement agreement" (Doc. No. 177 at 1). Plaintiff further avers
9 that, should the Court enter such an Order, it "will not seek tolls or any other
10 compensation from the public for using the so-called old Diamond Bar Road through its
11 property (the "Old Road") provided that a governmental agency will take responsibility for
12 the public's use of what would otherwise be a private road on Grand Canyon Ranch's
13 property." (Doc. No. 186).

14 **I FINDINGS OF FACT**

15 In its July 3, 2013 Order, the Court made the following Findings of Fact, which are
16 again appropriate here.

17 A. Plaintiff and Defendants came to a settlement agreement in 2007 providing
18 Defendants with an easement across Plaintiff's property. The agreement set out conditions
19 for the construction of the portion of a roadway, the New Road that was to be on
20 Plaintiff's property. (Doc. 116-2.)

21 B. Plaintiff erected a toll booth on its property and began charging tourists an
22 "admission fee" for passage, which included full access to Plaintiff's amenities. (Doc. 139
23 at 2.)

24 C. After Plaintiff began collecting tolls for crossing his property on the under-
25 construction roadway, Defendants began building a temporary bypass road ("Bypass
26 Road") that fell within the meets and bounds of the easement granted to them in the
27 settlement agreement.
28

1 In addition to the foregoing, the Court continues its Findings of Fact, based on
2 evidence within the Parties' pleadings referenced above and taken at the September 25,
3 2013 evidentiary hearing:

4 D. Defendants have maintained and instituted a Traffic Control Plan over the
5 "Bypass Road" since its inception. (Doc. 198, Ex. 3,4).

6 E. The "Bypass Road" continues to be within the meets and bounds of the
7 easement granted to Defendant in the settlement agreement. (Doc. 164).

8 F. Since inception of the "Bypass Road," there has been no flooding in the new
9 alignment of Diamond Bar Road in the areas in which Fann has been able to perform its
10 earth moving and install drainage features in accordance with the project plans. (Doc.
11 198).

12 G. Since inception of the "Bypass Road," there have been no vehicle accidents
13 on the new alignment of Diamond Bar Road that are attributable to the public use of the
14 "Bypass Road." *Id.*

15 H. Pursuant to Paragraph 6 of the Parties' 2007 Settlement Agreement,
16 Defendants have relinquished control over the 2007 existing alignment over [Old]
17 Diamond Bar Road. (Doc. 116-2).

18 **II CONCLUSIONS OF LAW**

19 A. To obtain a preliminary injunction, Plaintiff must establish: (1) that it is
20 likely to succeed on the merits; (2) that in the absence of preliminary relief, it is likely to
21 suffer irreparable harm; (3) that the balance of equities tips in its favor; and (4) that an
22 injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7,
20 (2008).

23 B. Defendant can be held liable under the Federal Tort Claims Act for accidents
24 occurring on the Right-of-Way over Plaintiff's Property. *See Ben v. United States*, CV 04-
25 1850-PCT-PGR, 2007 WL 1461626 (D. Ariz. May 16, 2007).

26 C. Plaintiff has failed to establish either the probability of success or likelihood
27 of irreparable harm in the absence of a preliminary injunction. No evidence has been
28 introduced showing guaranteed, future damage to Plaintiff's business from the public's

1 use of the “Bypass Road,” nor does any evidence exist indicating that potential lawsuits
2 accruing on the Right of Way will inure to Plaintiff’s detriment. Moreover, Plaintiff has
3 introduced no legal authority that would permit Defendant to reestablish control over
4 portions of Old Diamond Bar Road absent a conveyance of title.

5 **III STIPULATED ORDER**

6 Despite the foregoing, the United States proposed the following stipulations in its
7 Response, (Doc. No. 198 at § VI), which the Court now adopts and Orders. In doing so,
8 the Court makes no conclusion at this time concerning its ability to order specific
9 performance against the Government.

10 A. Within fourteen days of this Order, Plaintiff is ORDERED to grant the
11 Bureau of Indian Affairs (“BIA”) a full and unencumbered “Temporary Easement”
12 covering the portion of Old Diamond Bar Road traversing Grand Canyon Ranch that was
13 abandoned pursuant to Paragraph 6 of the Parties’ Settlement Agreement until the “first
14 lift” of paving is completed on the portion of the Right-of-Way across Plaintiff’s property.

15 B. The Temporary Easement must permit the BIA to “regulate, warn, and
16 inform the traveling public.”

17 C. Following recordation of the Temporary Easement in the Mohave County
18 Recorder’s Office, the BIA is ORDERED to assume liability for accidents on the
19 Temporary Easement for which it is responsible as proscribed under the provisions of the
20 Federal Tort Claims Act. The BIA will not indemnify any negligence of the Plaintiff.

21 D. Following recordation of the Temporary Easement in the Mohave County
22 Recorder’s Office, the BIA is ORDERED to maintain and provide for policing of the
23 Temporary Easement for the duration outlined in Paragraph III.A.

24 E. Plaintiff is prohibited from charging a toll, license, or any fee related to the
25 Temporary Easement whatsoever to any person, company, government or tribal entity,
26 public traveler, tour group, or anyone else for the duration of the Temporary Easement
27 outlined in Paragraph III.A.
28

1 F. Plaintiff is prohibited from interfering, rescheduling, restricting, or blocking
2 traffic through the area covered by the Temporary Easement in any way for the duration of
3 the Temporary Easement outlined in Paragraph III.A.

4 **IT IS SO ORDERED**

1 Respectfully submitted this 24th day of September, 2013.

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4 District of Arizona

5 s/Peter M. Lantka
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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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s/Mary C. Bangart
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